A

AFFIN BANK BHD

v.

NUPAX SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[SUIT NO: D5 (D9)-22-2084-2000]
30 NOVEMBER 2006

C ***CONTRACT:*** *Hire-purchase - Default - Claim for outstanding sum - Proposed settlement agreement - Whether there was consensus ad idem between parties - Whether original hire purchase agreement to prevail - Contracts Act 1950, s. 7(a)*

D The plaintiff, a licensed finance company, claimed a sum of RM577,047.78 from the defendants under a hire purchase agreement. Both parties earlier failed in their attempt to enter a settlement agreement to repay or reschedule the debt due and owing. The defendants claimed that they had agreed to the E plaintiff's request for a fresh hire purchase agreement but objected when the agreement sent to them imposed further interest charges contrary to what they had orally agreed to.

Held (in favour of plaintiff):

F **(1)** The facts showed that there was a proposal for settlement but both parties could not come to an agreement on certain terms. The defendants never executed the proposed agreement and no payments were made in furtherance of the proposed agreement. (para 26)

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(2) Pursuant to s. 7(a) of the Contracts Act 1950, for a contract to exist, the defendants' acceptance of the plaintiff's proposed terms of settlement must be absolute and unqualified. Applying the facts to the law, there was no acceptance of the proposed H settlement agreement forwarded by the plaintiff to the 1st defendant. The proposed settlement agreement never came into existence. Therefore, both parties should revert to the original agreement. The defendants could not abrogate and reprobate especially when the defendants admitted owing the I plaintiff the agreed sum. (paras 27, 28 & 29)

(3) The defendants never pleaded the existence of an oral agreement. Being an essential element of the defendants' defence, the issue should have been pleaded in the first place. Further, the existence of an oral agreement was never put to the plaintiff's witnesses during cross-examination. The defendants also never introduced it during the defence case. Therefore, the defendants were barred from raising this issue at the submission stage. (paras 33 & 34)

(4) The plaintiff wanted the defendants to execute a fresh hire purchase agreement. The defendants did not want to do so. Instead they wanted to execute a settlement agreement. Both parties were not *ad idem*. An oral agreement cannot come into existence when the parties are not *ad idem*. (paras 35, 36 & 37)

(5) The law on mistake was not applicable because there must have been a concluded contract between the plaintiff and the defendants. If parties are at cross-purposes with regard to the terms of the proposal settlement, there is no consensus *ad idem* and the purported settlement agreement never materialised in the first place. (para 41)

(6) Whatever discussed and agreed between the parties herein did not constitute a contract in law. It was only a record of terms upon which they agreed as a basis for the negotiation of the settlement agreement. Therefore, the law relating to 'subject to contract' as submitted by the defendants was not applicable to the facts and circumstances of the case. (para 45)

(7) There was an attempt by the parties to opt for settlement *via* a "compromise agreement", *ie*, the plaintiffs agree to terminate the original hire purchase agreement upon full implementation and execution of the "settlement agreement" or "compromise agreement". The termination of the original hire purchase agreement could only come about if there was in place a "compromise agreement". There was no "compromise agreement" since the parties did not reach an agreement on the terms counter proposed by the plaintiff. (para 49)

(8) The plaintiff's version that the fixed deposit sum of RM500,000 was set off pursuant to the Memorandum of Deposit and letter of set off was more acceptable than the defendants' version that it was consideration for the settlement agreement. The set off took place about 1 year 5 months after

A the proposal for settlement was made. That showed that the set off had nothing to do with the settlement agreement. The set off was done when there was no longer an agreement in place and the plaintiff was exercising its rights pursuant to the Memorandum of Deposit and letter of set off. (para 56)

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(9) The hire purchase agreement was an industrial hire purchase agreement. It was not a hire purchase agreement pursuant to the Hire-Purchase Act 1967. Therefore there was no rebate for accelerated repayment. The terms of the hire purchase C agreement should prevail and the parties were bound by the terms therein. (para 59)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chong Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(foll)***

D *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC* ***(foll)***

Tan Chiw Thoo v. Tee Kim Kuay [1997] 1 CLJ 541 FC ***(refd)***

Tan Ghee Hoe & Anor v. Ramjethmal Punjabi [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022 HC ***(refd)***

E **Legislation referred to:**

Contracts Act 1950, s. 7(a)

Other source(s) referred to:

Dato' Seri Visu Sinnadurai, *The Law of Contract,* 3rd edn, p 314, section 6.23

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8 Halsbury's Law, 3rd edn, p 75

9(1) Halsbury's Law of England, 4th edn, Reissue 1998, para 740

For the plaintiff - Allen Miranda Emmanuel; M/s AI Nathan & Isa Aziz Ibrahim

G *For the defendants - Chandra Nair; M/s SBS Maniam Nohair & Azizan*

Reported by Usha Thiagarajah

JUDGMENT

H

Ramly Ali J:

The Plaintiff's Claim

[1] The plaintiff's claim against the defendants is for a total sum I of RM577,047.78 as at 15 August 2000 due from the defendants to the plaintiff together with interest at 1.25% p.a. from 16 August 2000 till date of satisfaction, costs and any other relief as the court deems fit.

[2] In the plaintiff's statement of claim the plaintiff says that:

(a) the plaintiff is licensed (finance company) under the laws of Malaysia;

(b) at the request of the 1st defendant, the plaintiff executed a Hire Purchase Agreement No: 1 HP/0041/0105 dated 6 February 1996 which the plaintiff hired out by way of hire purchase to the 1st defendant, goods mentioned in the Schedule to the said HP Agreement and the 1st defendant in exchange agreed to abide by all the other terms contained in the said HP Agreement;

(c) as further consideration the 2nd, 3rd and 4th defendants executed a guarantee and indemnity dated 6 February 1996 and undertook to pay all monies owing by the 1st defendant to the plaintiff and also indemnify the plaintiff against all losses;

(d) the terms of the said HP Agreement among other things stated that the total hire purchase sum was for RM1,146,600 which was repayable in 48 monthly installments of RM23,887.50 commencing from 8 February 1996;

(e) the 1st defendant defaulted in payment of the installments under the said HP Agreement and as at 15 August 2000 a balance of RM577,047.78 continues to be due and owing from the 1st defendant to the plaintiff; and

(f) the plaintiff' solicitors then issued a notice for the payment of the said balance sum of RM577,047.78 to the 1st defendant and the other defendants as guarantors but the 1st defendant and the other defendants have failed to pay the said amount.

[3] Consequent to this default and on the terms of the said HP Agreement and the Guarantee and Indemnity, the plaintiff claim the amount as earlier stated against the 1st, 2nd, 3rd and 4th defendants.

The Defence

[4] The defence very briefly, is that having obtained a leasing facility of RM1 million from the plaintiff, the 1st defendant purchased two (2) sets of goods on hire purchase. Two hire purchase agreements were signed, one as mentioned by the plaintiff in their statement of claim and another is the subject matter of a civil action in the Kuala Lumpur Sessions Court.

[5] The security for the overall leasing facility was a deposit of RM500,000 made by the 1st defendant which was held by the plaintiff by a fixed deposit receipt with a letter of set-off given by the 1st defendant to the plaintiff.

[6] Within ten (10) months after executing the two (2) HP Agreements, the 1st defendant realising that they would not be able to carry on with the intended business and meet the monthly installment repayments to the plaintiff, proposed a settlement of both hire purchase accounts.

[7] The 1st defendant contends that the plaintiff accepted the 1st defendant's proposal for the settlement of the two hire purchase accounts, which was to be effected by the plaintiff liquidating the fixed deposit sum of RM500,000 and setting it off against the aggregated balance that was due from the 1st defendant under the hire purchase accounts. The defendants also contend that as there was early settlement, discounts were also given to reduce the liability further and the plaintiff thereafter expressly indicated to the 1st defendant that the balance then due would be RM340,870.35.

[8] The 1st defendant says that the plaintiff however wanted a fresh HP Agreement to be signed and although the 1st defendant was agreeable to this requirement, they were however surprised when the fresh HP Agreement was sent to them by the plaintiff, to note that the plaintiff had imposed further interest charges to which, the 1st defendant objected.

[9] The 1st defendant admit that a sum of RM340,870.35 was what they had agreed to pay and this settlement had been crystalised and was therefore binding and they had only sought a period of 36 months to pay the said balance by installments.

[10] Accordingly the 1st defendant contends that the plaintiff's claim as pleaded is wrong in law, as an oral settlement agreement had indeed come into effect. The plaintiff's claim therefore, based on the said HP Agreement as pleaded, is no longer enforceable as the agreement had in effect been terminated and a new settlement agreement, albeit oral, had come into effect.

The Plaintiff's Case

[11] It is the plaintiff's case that the defendants are in breach of the Hire Purchase Agreement No: 1 HP/0041/0105 dated 6 February 1996. The 1st defendant has admitted (in the defendants' statement of defence at para. 2 and also he "agreed facts" at para. 6) executing the said HP Agreement. The 2nd, 3rd and 4th defendants have also admitted signing the letter of guarantee and indemnity dated 6 February 1996.

[12] The defendants have admitted that they do in fact owe the plaintiff a sum of RM340,870.35 (as stated in the 5(4) statement of defence, at para. 5(4). This admission was also made during trial (as per Notes of Evidence dated 31 July 2006 at p. 6, para 4).

The Defendants' Case

[13] The defendants' entire defence is based on one issue. The defendants say that both parties entered into negotiations for settlement (which included another Industrial Hire Purchase agreement which is not a subject matter of this suit) and that they agreed to pay the plaintiff a sum of RM340,870.35. However, the defendants claim (which is denied by the plaintiff) that the plaintiff renegade on its word when the plaintiff:

(a) gave the defendants a fresh hire purchase agreement for execution; and

(b) included a sum of RM66,469.29 as "interest".

Finding Of The Court

[14] Both parties executed the original Hire Purchase Agreement No: 1 HP/0041/0105 dated 6 February 1996. After 10 months the 1st defendant realising that they would not be able to carry on with the intended business and meet the monthly installment repayments to the plaintiff, proposed a settlement of the said hire purchase agreement. Parties then entered into negotiations for the settlement. Ultimately the defendants gave evidence in court that they, could not agree on the settlement as they claimed the plaintiff wanted to impose two clauses (which were not agreeable to the defendants), namely:

(a) the execution of a fresh Hire Purchase Agreement; and

(a) the inclusion of a sum of RM66,469.29 as "interest",

[15] In his examination-in-chief, DW1 (the only witness for the defendants) testified that "there was no discussion about fresh hire-purchase agreement because I wanted to settle the loan". During re-examination DW1 reaffirmed that "... at that time, there is no indication about a new HP Agreement."

[16] The court is of the view that the defendants' objection to the execution of a fresh hire-purchase agreement is without foundation. During cross-examination DW1, on 31 July 2006, said: "This agreement was forwarded to us but we did not accept it. I am agreeable to the agreement at Tab 9, but not at Tab 11."

[17] Referring to the agreement at Tab 9 (para 3 and 4) it is stated:

> Since a fresh agreement will be drawn-up, the above agreement will be terminated provided that you have executed a fresh Industrial Hire Purchase agreement.
>
> The following will be taken into consideration in drawing up the new Industrial Hire Purchase agreement ...

[18] The draft agreement at Tab 9 clearly states that the defendants would have to execute a fresh hire purchase agreement. DW1 gave evidence that he is agreeable to the said agreement at Tab 9.

[19] The fact that the defendants were agreeable to the drawing up of a fresh hire purchase agreement was also expressly pleaded in the defendants' statement of defence at para 5(4) where the defendants had pleaded;

> (4) The 1st Defendant with the consent of the 2nd, 3rd and 4th Defendants thereafter approached the Plaintiffs with the proposal that the deposit sum of RM500,000.00 be set-off against the aggregated balance then due namely RM840,872.35 for both the Machinery H.P. Facility and the Forklift Agreement and upon settlement hereof, the balance of RM340,870.35 be consolidated into a **fresh Hire Purchase** with a revised monthly installment ...

Therefore DW1's evidence during trial "that there is no indication about a new hire purchase agreement" is totally unreliable and inconsistent with his own pleadings.

[20] On the inclusion of a sum of RM66,469.29 as "interest", the court finds that the defendant objection is misconceived because both documents at Tab 9 (which DW1 had agreed to) and Tab 11 are the same. In Tab 9, the accounts is presented in a column format wherein in Tab 11, the same figures are presented, but this time the figures are inserted into the Schedule of the agreement. This was highlighted during cross-examination of DW1.

[21] The defendants were agreeable to the agreement at Tab 9. This means they were agreeable to pay RM11,314.99 per month for a period of 36 months. This works out to a total sum of RM407,339.64. This figure of RM407,339.64 is reflected at the Schedule of the agreement at Tab 11 (3rd box, 7th line under the column "Total Hire Purchase Price: RM407,339.64.") So, clearly, there is no difference at all.

[22] The figures of RM66,469.20 as an "interest" is actually the difference between RM407,339.64, less RM340,870.35. This figure of RM66,469.29 is reflected at the Schedule of the agreement at Tab 11, 3rd box, 8th line under the column "Add Finance Charges: (6.50% p.a.) RM66,469.29."

[23] Based on the explanations given and based on the defendants' own testimony in court *vide* DW1's evidence (dated 31 July 2006) that he was willing to pay RM407,339.63, it is clear that the defendants' objection to this figure of RM66,469.29 as an "interest" is misconceived.

[24] What is the position of the law when parties cannot agree on the terms of a proposed settlement agreement ie, when one party alleges that the other party has added on/included terms not agreed upon.

[25] In the present case, the defendants did not agree to the provisions of the agreement requiring the defendants to sign a fresh hire purchase agreement as well as the inclusion of a sum of RM66,469.20 as "interest".

[26] From the facts therefore there was a proposal for settlement, both parties could not come to an agreement on certain terms, the proposed agreement was never executed by the defendants and the defendants never made any payment in furtherance of this proposed agreement.

[27] Under the Malaysian Contracts Act 1950, for a contract to exist, the defendants' acceptance of the plaintiff's proposed terms of settlement as found in bundle a Tab 9 must be absolute and unqualified. This is found in s. 7(a) Contracts Act 1950.

[28] In *Tan Chee Hoe & Anor v. Ram Jethmal Punjabi* [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022, Wee Chong Jin CJ (of Singapore) approved the passage in *8 Halsbury's Law* (3rd edn) at p. 75 that:

> In order to constitute acceptance, the assent to the terms of an offer must be absolute and unqualified ... . If the acceptance is conditional, or any fresh term is introduced by the person to whom the offer is made, his expression of assent amounts to a counter-offer, which in turn requires to be accepted by the person who made the original offer.

[29] Applying the facts to the law, the court finds that there was no acceptance of the terms of the proposed settlement agreement as forwarded by the plaintiff to the 1st defendant and therefore the proposed settlement agreement never came into existence. The proposed settlement agreement never materialized; therefore both parties should revert to the original agreement ie, 1 HP/0041/0105 dated 6 February 1996. This is because the defendants cannot abrogate and reprobate especially when in the present case the defendants have admitted owing the plaintiff a sum of RM340,870.35.

[30] The defendants also contend that the plaintiff's claim as pleaded is wrong in law as an oral settlement agreement had indeed come into effect between the plaintiff and the defendants. The defendants contend that the plaintiffs claim is no longer enforceable as the said hire purchase agreement dated 6 February 1996 had in effect been terminated and a new settlement agreement, albeit oral, had come into effect.

[31] Therefore, the next issue to be determined by the court is: Is there an oral agreement in place of the original Hire Purchase Agreement 1 HP/0041/0105 dated 6 February 1996 and what is the position in law?

[32] The court's observation on this issue is three fold, namely:

(a) the existence of an oral agreement was never pleaded;

(b) the existence of an oral agreement was never put to the plaintiff's witnesses during cross-examination. It was also never introduced by the defendants during the defence case; and

(c) an oral agreement cannot come into existence because parties are not *ad-idem.*

[33] The existence of an oral agreement was never pleaded by the defendants. Being an essential element of the defendants' defence, the issue should have been pleaded in the first place. Parties are bound by their pleadings. Therefore, the court rules that the defendants are barred from raising this issue at submissions stage.

[34] The issue on the existence of an oral agreement was also never put to the plaintiff's witnesses during cross-examination. It was also never introduced by the defendants during the defence case. Again, the court, finds that the defendants are barred from raising this issue at submission stage. The court finds support for this finding from the decision of the Court of Appeal in the case of *Aik Ming (M) Sdn. Bhd. & Ors. v. Chong Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639 where Gopal Sri Ram JCA stated:

> The rule in *Browner v. Dunn* has been applied by Indian Courts in the context of the Indian Evidence Act 1872, on which is based our Evidence Act 1950. I need only refer to the decision in *Carapiet v. Derdeian* AIR [1961] Cal 359, where Mukharij J at page 362 of the report, expressed the principle in the following words:
>
> > The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice.
> >
> > It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a Counsel is bound to do when cross-examining that he must put to each of his opponents witnesses in turn, so much of his own case as concerns that particular

A witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the Plaintiffs account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[35] The court is also of the view that an oral agreement as C alleged by the defendants cannot come into existence because parties are not *ad-idem.*

[36] The plaintiff wanted the defendants to execute a fresh hire purchase agreement. The defendant say they did not want to do D so. The defendant say they wanted instead to execute a "settlement agreement". What is obvious is that both parties are not *ad-idem.*

[37] Therefore, in law, this oral agreement could not come into existence. To support this finding, the court refers to the case of E *Ayer Hitam Tin Dredging Malaysia Bhd. v. Y.C. Chin Enterprises Sdn. Bhd.* [1994] 3 CLJ 133, where the Supreme Court held, *inter alia*, as follows:

F The existence of an agreement depends upon the intention of the parties, who must be *ad-idem*. It may be inferred from the language used, the parties' conduct having regard to the surrounding circumstances and the object of the contract. The Court will generally apply an objective or reasonable man rest.

[38] Both in fact and in law, the court is satisfied that there was G no oral agreement as alleged by the defendants.

[39] One further point was raised by the defendants in their submissions ie, was there a "mistake" on the part of the plaintiff when they accepted the 1st defendants' offer for settlement?

H **[40]** The defendants contend that there was some confusion on the part of the plaintiff as to what was agreed on the amount due and owing from the defendants to the plaintiff. The defendants contend that in the letter dated 16 December 1996 the plaintiff I agreed that the balance amount due from the 1st defendant was RM240,870.35. However, in their letter dated 5 December 1996, they proposed a fresh credit line of RM386,384.14. But later,

according to the defendants, in the new Hire Purchase Agreement, with added interest, the amount now repayable had increased to RM407,339.64.

[41] The court is of the view that the law on "mistake" is not applicable because before one party can rely on the defence of "mistake", there must have been a concluded contract between the plaintiff and the defendants. If parties are at cross-purposes with regard to the terms of the proposal settlement, then there is no consensus *ad-idem* and therefore the purported settlement agreement never materialised in the first place. That being the case, the issue of "mistake" does not arise at all.

[42] In support of this the court refers to *"The Law of Contract"* by Dato' Seri Visu Sinnadurai 3rd edn, p 314, s. 6.23, third paragraph onwards where it is stated:

> On the other hand, where the parties are at cross-purposes, as in cases where there is a mistake as to the terms of the contract, it may be said that, there is also no binding contract, as there is no consensus ad-idem (assent to the same thing in the same sense.). For example, see the approach adopted by Biggs J in *M. Pakiam v. Y.P. Devathanjam* [1952] MLJ 58. In such cases, there is an absence of genuine agreement between he parties ...

[43] The defendants have also raised the issue of "subject to contract" in the present case. The defendants argue that there is little doubt that the plaintiffs and the 1st defendant had not only the mere intention "to create legal relations" but their oral discussions for a amicable settlement was indeed translated into reality. The agreement came into effect the moment the parties concluded their meeting and subsequently the plaintiffs wrote their letter dated 16 December 1996 (Tab 9).

[44] The defendants rely on the words "provided you have executed a fresh HP Agreement" as contained in the plaintiff's letter to the defendants dated 16 December 1996 (Tab 9) in saying that the law on "subject to contract" is applicable. The defendants further argue that all parties are anxious to have the settlement effected; it was orally agreed and subsequently put into writing by the plaintiff pointing out that a fresh HP Agreement would have to be signed. To the defendants, that does not detract from the fact that an oral agreement had come into effect, even if the fresh HP Agreement was not signed, as in the present case.

[45] In the present case, what both parties attempted to do was to enter into a settlement agreement to repay or reschedule the debt due, owing and admitted. The requirement that the defendants need to "execute a fresh HP Agreement" as contained in the plaintiff's letter dated 16 December 1996, is a condition (pre condition) that need to be fulfilled before the "settlement agreement" can take effect. If the said "fresh HP Agreement" is not executed, then there is no agreement in existence. There is also no oral agreement in existence, as discussed earlier. There are several essential matters which still remained to be settled between the parties. Among them are the issue of "a fresh HP Agreement" that need to be executed; the total amount due and owing which was still being disputed by the defendants; and the issue of the additional "interest" as raised by the defendants. Therefore, whatever has been discussed and agreed between the parties in the circumstances of this case, including the plaintiff's letter dated 16 December 1996, as of that material date did not constitute a contract binding in law upon the parties. It was only a record of terms upon which they were agreed as a basis for the negotiation of the settlement agreement. Therefore, the law relating "subject to contract" as submitted by the defendants is not applicable to the facts and circumstances of the present case.

[46] There is one pertinent point in the facts of this case which is there was already in existence a concluded hire purchase agreement executed by the plaintiff and the defendants ie, Hire Purchase Agreement Number 1 HP/0041/0105 dated 6 February 1996 wherein there was a debt accrued and owing. This is admitted by the defendants. What both parties attempted to do was to enter into a settlement agreement to repay/reschedule the debt due and admitted. Therefore the law that may be considered here applicable is the law pertaining to "compromise agreement".

[47] "Compromise" is defined in *9(1) Halsbury's Law of England,* 4th edn, Reissue 1998, at para 740, as follows:

> Where a party agrees to forbear from suing a good claim, that may be a valuable consideration for a promise, whether he agrees to forbear absolutely or for a certain time or for no specified time at all. Moreover, even where the promise to forbear is for some reason invalid, the actual forbearance may be valuable consideration.

[48] In *Tan Chiw Thoo v. Tee Kim Kuay* [1997] 1 CLJ 541, Peh Swee Chin SCJ observed that "the consideration for such a compromise is often therefore one's promise to retrain or forbear from litigating a claim in exchange for a promise from the other to give up a bit of or part of that which the promisor claims." A

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[49] In the present case, there was an attempt by the parties to opt for settlement *via* a "compromise agreement" ie, the plaintiffs agree to "terminate" the original Hire Purchase Agreement No: 1 HP/0041/0105 dated 6 February 1996 upon full implementation and execution of the "settlement agreement" or "compromise agreement". Here, as stated above, the "settlement agreement" or the "oral agreement" (as cited by the defendants) has not been executed and not in existence at all in law. The defendants' submissions that an oral agreement will "terminate" the earlier hire purchase agreement dated 6 February 1996 is flawed because given the admission of the debt due and owing pursuant to the earlier hire purchase agreement, such a "termination" of the earlier hire purchase agreement can only come about if there is in place a "compromise agreement". In the present case there was no "compromise agreement" effected as parties could not reach an agreement on the terms as counter-proposed by the plaintiff, since the defendants refused to sign the draft agreement as in Tab 11 as forwarded by the plaintiff. C D E

[50] The issue of quantum due and owing was also raised by the defendants particularly on the question about the liquidation of the fixed deposit of RM500,000 *vis-a-vis* the amount due and owing. F

[51] The amount claimed by the plaintiff in the statement of claim is RM577,047.78 as at 15 August 2000. The defendants do not question the accuracy of the figures as presented by the plaintiff's witnesses PW1 and PW2. The defendants however take issue with the liquidation of the fixed deposit sum of RM500,000. In their submission, the defendants submit that the fixed deposit sum of RM500,000 was the consideration for the settlement agreement. G H

[52] However, during cross-examination PW2 stated:

> This proposal was to take effect immediately. I am aware that the RM500,000.00 deposit was not set-off until May 1998 ie, 1 1/2 years later. The offer was made but was not accepted. That's why the delay ... I

[53] Earlier during re-examination PW1 explained:

> The set-off was done only in 1998, because of negotiation and discussion period going on. The Bank exercised it's right under the Memorandum of Deposit and letter of set-off.

[54] The "Memorandum of Deposit of Fixed Deposit as Security" is found at Bundle B. At the 2nd paragraph at line number 11, the defendants agreed as follows:

> I/we hereby authorise you without further notice to me/us to apply such monies including interest, if any, accrued or accruing due on my/our said deposit account or any other accounts as you may think fit in satisfaction of all monies and liabilities due and/or owing to you as aforesaid.

[55] The defendants therefore agreed that the deposit sum of RM500,000 could be used by the plaintiff to set-off against the overdue hire purchase account.

[56] So, which version is true?

Is it the defendants' version that the sum of RM500,000 was the consideration for the "settlement agreement" or is it the plaintiff's version that this sum was set-off pursuant to the memorandum of deposit and letter of set-off?

The court finds that the answer lies in the timing of the set-off. The proposal for settlement was made on 16 December 1996. The set-off took place in May 1998, ie, some 1 year 5 months later. This shows that the set-off had nothing to do with the "settlement agreement". The set-of was done as per PW2's, evidence, when there was no longer an agreement in place, and as stated by PW1, the plaintiff was exercising their rights pursuant to the memorandum of deposit and letter of set-off.

[57] At this juncture the court is satisfied that the plaintiff has proven its case on a balance of probabilities. The issue of liability was never disputed by the defendants. Further as stated above, the plaintiff has also proven the issue of quantum.

[58] Finally, the defendants raised the issue whether an earlier settlement of the debt pursuant to the "settlement agreement" has reduced the sum due and owing. The defendants contend that although an aggregate loan of RM1.2 million had been lent, the plaintiff had within 10 months recovered 75% of the loan and also

collected further interest thereon and surely with this background the 1st defendant had every reason to expect some form of "rebate" particularly with regard to dispensation of further interest charges on the installment payments proposed.

[59] The court observes that the agreement in question before this court is an Industrial Hire Purchase Agreement. It is not a hire purchase agreement pursuant to the Hire Purchase Act. Therefore, there is no "rebate" given for accelerated repayment. This was confirmed by PW2 in his evidence. The court accept PW2's evidence when he said:

> There is no element of compounding interest in this Hire Purchase Agreement. Even if the loan is settled earlier, the schedule will not change.

The terms of the hire purchase agreement shall prevail. Parties are bound by these terms.

Conclusion

[60] Based on the several reasons adumbrated above, the court is satisfied that the plaintiff has proved it's case on the balance of probabilities against all the defendants. Therefore, the court rules that judgment be entered in favour of the plaintiff against all the defendants as prayed for in the plaintiff's amended statement of claim at prayer (a) and (b) with costs.